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No. 85-1259 (4)

# In the Supreme Court of the United States

OCTOBER TERM, 1985

EDWARD LUNN TULL, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Seventh Amendment guarantees an alleged violator of the Clean Water Act and Rivers and Harbors Act a right to a jury trial in an action brought by the United States seeking injunctive relief, restoration of filled wetlands, and civil penalties.

2. Whether the court of appeals properly found no basis for applying equitable estoppel to prevent enforcement of the Clean Water Act and Rivers and Harbors Act.

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***ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT***

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 769 F.2d 182. The opinion of the district court (Pet. App. 30a-63a) is reported at 615 F. Supp. 610.

## JURISDICTION

The decision of the court of appeals was issued on July 30, 1985. A petition for rehearing was denied on October 30, 1985 (Pet. App. 26a-27a), and November 4, 1985 (Pet. App. 28a-29a). The petition for a writ of certiorari was filed on January 24, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Judgment was entered against petitioner by the United States District Court for the Eastern District of Virginia (Pet. App. 30a-66a) for violating the Clean Water Act,

33 U.S.C. (& Supp. II) 1251 *et seq.*, and the Rivers and Harbors Act, 33 U.S.C. 401 *et seq.*, by his filling activity at four locations on the island of Chincoteague, Virginia, without the requisite permits. The court of appeals (Pet. App. 1a-25a) affirmed.

1. Petitioner is a longtime resident of Chincoteague, engaged in the business of filling and developing residential resort properties on the island (Pet. App. 32a). Beginning in 1975, he filled approximately 12.5 acres of wetlands in developing four of these properties (see *id.* at 4a). Thereafter, the United States filed a complaint, charging him with violation of the Clean Water Act, and, under the amended complaint, violation of the Rivers and Harbors Act as well (*id.* at 30a, 67a-74a).[1] The complaint alleged that petitioner had discharged pollutants into waters of the United States without a permit from the Army Corps of Engineers, in violation of 33 U.S.C. 403, 1311(a) and 33 U.S.C. (& Supp. II) 1344. The United States sought an order enjoining petitioner from committing further violations, directing removal of fill and restoration of affected areas, assessing civil penalties in the amount of $10,000 per day of violation, awarding the government's costs in the action, and granting such other relief deemed just and proper by the court (Pet. App. 72a).

The district court denied petitioner's request for a jury trial (see Pet. 4). At a 15-day bench trial, petitioner did not contest that he filled the properties in question, nor did he

[1]Unauthorized filling of navigable waters of the United States is prohibited by Section 301 of the Clean Water Act, 33 U.S.C. 1311, and Section 10 of the Rivers and Harbors Act, 33 U.S.C. 403. Section 309 of the Clean Water Act, 33 U.S.C. 1319, provides for initiation of a civil action for appropriate relief against any person in violation of Section 301. Appropriate relief may include a permanent or temporary injunction (33 U.S.C. 1319(b)) and civil penalties not to exceed $10,000 per day of violation (§ 1319(d)).



claim that he had ever applied for a permit to fill from the Corps of Engineers (Pet. App. 4a). He argued instead that the properties he filled were not wetlands and that the waters at issue were not navigable and therefore he did not need any permits, that the United States should be estopped from claiming he needed such a permit, and that the Clean Water Act and Rivers and Harbors Act and the government's regulations thereunder were unconstitutional as applied to him (*ibid.*).

2. The district court found that petitioner had filled portions of all four properties that were wetlands or navigable waters (Pet. App. 32a-50a). The court found no merit in petitioner's contentions that the statutes and regulations relied upon by the government were unconstitutional either as a taking of his property or as unconstitutionally vague (*id.* at 54a-55a). It also rejected petitioner's claim that the government should be equitably estopped from challenging his filling activities (*id.* at 55a-58a). The court found this contention to be "without foundation" since "the agents of the United States government did not mislead [petitioner]" (*id.* at 56a). The court stated that "perhaps" a showing of affirmative conduct by the government would warrant a departure from the general rule that equitable estoppel does not lie against the government, but found that "[t]he evidence here failed to disclose any statements or conduct of an affirmative nature" which could have misled petitioner, and that it was not "shown that any silence or inaction by the government was purposefully designed to mislead or confuse [petitioner]" (*id.* at 57a). The district court also pointed out that the other enforcement actions pending against petitioner at the time[2] made him "well aware of the necessity

[2]Earlier in its opinion (Pet. App. 35a-36a), the district court also discussed a preliminary injunction it had issued in this action regarding petitioner's filling activities.

for applying for permits" (*id.* at 58a), and that "[petitioner's] activities appear to this Court to have been a deliberate attempt at evasion and misdirection by [petitioner]. Such actions would never support a claim for an estoppel even were the government not involved" (*ibid.*).

For his violations, petitioner was fined $75,000 for various fillings (Pet. App. 60a); ordered to remove the fill in one instance and restore those lots to wetlands (*id.* at 61a), to restore two other lots to wetlands so as "not to punish" third parties (*id.* at 61a-62a), and to restore another area as well (*id.* at 62a); and was ordered to engage in no further filling activities without applying for a permit from the Corps of Engineers (*ibid.*). The penalty for the filling of another area was established by the district court in the alternative: petitioner could either pay a fine of $250,000 or "restore [it] * * * to its former navigable condition" (*id.* at 61a).

3. In affirming, the court of appeals rejected petitioner's claim that he had been erroneously denied his constitutional right to a trial by jury (Pet. App. 8a-10a). The court reasoned that penalties were assessed here pursuant to equitable powers, and also noted that it is an open question whether the Seventh Amendment applies to government litigation at all. The court also rejected petitioner's claim that the government's enforcement action should be barred by equitable estoppel (*id.* at 10a-11a). It discussed in some detail the ample support for the district court's conclusion that petitioner had in fact not been misled, and stated that it therefore "need not reach the issue whether misleading by silence or inaction, the most [petitioner] alleges here, could ever justify invoking the equitable estoppel doctrine against the government" (*id.* at 10a (citations omitted)). District Judge Warriner dissented on these two issues, and would



have reversed the district court (*id.* at 13a-25a).[3] The court of appeals denied rehearing en banc by a divided vote (*id.* at 26a-29a).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. The first question presented in this case is closely related to the first question presented in *M.C.C. of Florida, Inc.* v. *United States,* No. 85-1292 (petition for cert. pending).[4] In both cases, petitioners have claimed entitlement to a jury trial in actions brought by the United States to enforce the Clean Water Act and Rivers and Harbors Act. Relying in part on the court of appeals' decision in this case, the Eleventh Circuit held in *M.C.C.* that, because the issues raised under both statutes "were equitable in nature," "M.C.C. was not entitled to a jury trial." *United States* v. *M.C.C. of Florida, Inc.,* 772 F.2d 1501, 1507 (11th Cir. 1985) (footnote omitted). Both decisions are entirely correct, and there are no court of appeals or district court decisions to the contrary.[5]

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[3]The court of appeals also rejected petitioner's remaining constitutional claims (Pet. App. 6a-8a) and contention that one waterway involved was not navigable (*id.* at 12a); the court did "not think that [petitioner's] other contentions [regarding, inter alia, laches, collateral estoppel, challenges to the district court's statutory authority to levy a civil fine and its conduct of a view of the disputed area, and assertions that the Takings Clause and delegation doctrine had been violated] merit discussion" (*ibid.*).

[4]Petitioners in each case will be sent both briefs in opposition.

[5]The district courts that have considered the issue have also held that there is no right to a jury trial in a Clean Water Act enforcement action. See, *e.g., United States* v. *Atlantic Richfield Co.,* 429 F. Supp. 830, 839-840 n.13 (E.D. Pa. 1977), aff'd *sub nom. United States* v. *Gulf Oil Corp.,* 573 F.2d 1303 (3d Cir. 1978) (Table) (33 U.S.C. 1321); *United States* v. *Lambert,* 19 Env't Rep. Cas. (BNA) 1055 (M.D. Fla. 1983) (33 U.S.C. 1319).

The right to jury trial in civil actions is set forth in the Seventh Amendment to the Constitution: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *." This right applies to actions in which legal, as opposed to equitable, rights are to be ascertained. *Parsons* v. *Bedford,* 28 U.S. (3 Pet.) 433, 446-447 (1830).[6]

The court of appeals correctly held that there was no constitutional right to a jury trial in this civil enforcement action under the Rivers and Harbors Act or Clean Water Act. Regarding liability,[7] petitioner did not contest that he filled the areas at issue or that he failed to obtain a permit (see pages 2-3, *supra*). Instead, the trial was devoted principally to petitioner's contention that the properties he filled were not wetlands or navigable waters. This issue, being "primarily one of regulatory and statutory interpretation" (*United States* v. *Riverside Bayview Homes, Inc.,* No. 84-701 (Dec. 4, 1985), slip op. 4)), is clearly for resolution by the court.[8]

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[6]The lack of any legal (rather than equitable) issue in the present case makes it unnecessary to resolve whether there is a civil jury trial right at all in a case with the government. See *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n,* 430 U.S. 442, 449-450 n.6 (1977); Pet. App. 9a.

[7]It is not entirely clear whether petitioner wanted a jury to determine damages, liability, or both. While the former seems most likely (see Pet. 6-7, 16), we will discuss briefly the appropriateness of a jury determination of liability as well.

[8]In fact, if petitioner had applied for a permit before filling his property as the Clean Water Act requires, the agency would have determined in the first instance the extent of wetlands on petitioner's property. Review of the agency's decision in the district court would then have been pursuant to the arbitrary and capricious standard of the Administrative Procedure Act, 5 U.S.C. 706(2)(A). See *Avoyelles Sportsmen's League, Inc.* v. *Marsh,* 715 F.2d 897, 905 (5th Cir. 1983) (collecting cases).



Nor did the remedy in this case give rise to a jury issue. Contrary to petitioner's characterization of the relief sought by the United States as "in the nature of an action in debt" (Pet. 15),[9] it is clear that the remedies requested, and the actual remedial order entered by the district court, are solely equitable in nature. As this Court held in *Weinberger* v. *Romero-Barcelo,* 456 U.S. 305, 316 (1982), a district court in a Clean Water Act proceeding is called upon to exercise its "traditional equitable discretion in enforcing the statute." Such discretion should result in an order "that will achieve *compliance* with the Act" (*id.* at 318 (emphasis in original)). In particular, the civil penalties, upon which petitioner especially relies, are no less equitable in nature than the other relief ordered. As the EPA repeatedly has made clear, the purpose of civil penalties under the statutes at issue in this case is "deter[ring] people from violating the law," "fair and equitable treatment of the regulated community," and "swift resolution of environmental problems."[10] These are therefore equitable, not legal, remedies. The court of appeals accordingly was correct in holding that the district court was called upon "to exercise statutorily conferred equitable power in determining the amount of the fine" (Pet. App. 9a). Finally, the discretion afforded the court in setting civil penalties under these statutes is too

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[9]As this Court has stated, "Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty." *Stockwell* v. *United States,* 80 U.S. (13 Wall.) 531, 542 (1871). Here, the amount due is highly discretionary. See also Note, *The Availability of Jury Trials in Copyright Infringement Cases: Limiting the Scope of the Seventh Amendment,* 83 Mich. L. Rev. 1950, 1960 (1985).

[10]See EPA Memorandum 2-4 (Feb. 16, 1984), *reprinted in* [Federal Laws] Env't Rep. (BNA) 41:2991-41:2993; cited in *Chesapeake Bay Foundation* v. *Gwaltney of Smithfield, Ltd.,* 611 F. Supp. 1543, 1556-1565 (E.D. Va. 1985); see also EPA Memorandum (Feb. 11, 1986) (summarized in [Current Developments] Env't Rep. (BNA) 16:1974 (Feb. 21, 1986)).

great for them to be properly characterized as "legal" remedies. See generally Note, *The Availability of Jury Trials in Copyright Infringement Cases: Limiting the Scope of the Seventh Amendment*, 83 Mich. L. Rev. 1950, 1963 (1985) (collecting authorities).[11]

Moreover, despite petitioner's claims (Pet. 14-16), the penalty in this case does not stand alone, but rather is part of an overall remedial plan which included mitigation, restoration, and injunctive relief. As the court of appeals explained (Pet. App. 9a-10a (footnote omitted)):

> Here the assessment of penalties intertwines with the imposition of traditional equitable relief. The district court fashions a "package" of remedies, one part of the package affecting assessment of the others. This combined relief serves several goals, including environmental preservation and fairness to third party property buyers as well as deterrence.

Except with respect to civil penalties, petitioner does not argue that the remedy ordered here should have been one for a jury to formulate. And particularly where the penalties determination is made as part of a remedial " 'package' " which includes traditional equitable remedies, it is all the more clearly a matter involving the exercise of equitable judicial discretion.

Indeed, there was no function for a jury to perform in this case. Petitioner's filling of the wetlands and failure to obtain a permit were conceded. The district court had to resolve his jurisdictional argument and, when it did, it was established

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[11]Although petitioner relies (Pet. 12-13) on *United States* v. *J.B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974), that decision expressly commits determination of the amount of civil penalties "to the informed discretion of the district judge" (*id.* at 438 (citation and footnote omitted)), and thus contradicts his argument that a jury must make that determination.



that he had violated the Clean Water Act and Rivers and Harbors Act. The fashioning of an appropriate remedy was clearly a function for the district court as well. Nor has petitioner argued that a jury should have decided the issue of estoppel, which is plainly an equitable, not legal, defense. See *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 (1984).[12]

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[12]As the court of appeals noted (Pet. App. 10a), its holding is supported by *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937) (citations omitted), which held that the Seventh Amendment has "no application to cases where recovery of money damages is an incident to equitable relief." *A fortiori*, the Seventh Amendment has no application here, when the civil penalties incident to other equitable relief are not even damages. Contrary to petitioner's suggestion (Pet. 7-11), we find no indication in this Court's subsequent decisions calling this alternative holding in *Jones & Laughlin* into question. See *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 453 n.10 (1977). Certainly nothing in *Porter* v. *Warner Holding Co.*, 328 U.S. 395 (1946), does so. As petitioner acknowledges (Pet. 8), that case did not address the jury trial issue, and involved instead the equitable jurisdiction of a district court under the terms of another federal statute; as petitioner also seems to acknowledge (Pet. 9-10), this Court's decision in *Curtis* v. *Loether*, 415 U.S. 189, 196 (1974) (citing, inter alia, *Warner Holding Co.*), does not "go so far as to say that any award of monetary relief must necessarily be 'legal' relief" for Seventh Amendment purposes. This Court's decisions protecting a litigant's Seventh Amendment right in cases involving a mixture of legal and equitable issues (see Pet. 8-10) are, of course, inapposite to a case like this, where, as we have shown, there is nothing for the jury to determine.

Nor, contrary to Pet. 12-13, does the decision of the court of appeals conflict with *United States* v. *J.B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974). That case involved assessment of civil penalties for violation of orders issued by the Federal Trade Commission pursuant to Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*). This entirely different statutory scheme provided that the sole civil remedy for a subsequent violation of an order of the Commission—where the party had not contested it in the court of appeals—was through a penalty action (498 F.2d at 425). Here, of course, a civil penalty is only one part of a package of remedies a district court may utilize. Moreover, the court in *J.B. Williams* made clear that a jury trial would only be available "not, of course, as to the validity of the order [issued by the

2. Nor, contrary to petitioner's other contention (Pet. 18-21), is this case at all suitable for considering whether equitable estoppel can ever run against the government. Both the district court (Pet. App. 55a-58a) and the court of appeals (Pet. App. 10a-12a) found emphatically that the Corps did not mislead petitioner by its silence or inaction (see pages 3-4, *supra*), and this Court "has frequently noted its reluctance to disturb findings of fact concurred in by two lower courts" (*Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982), citing, inter alia, *Berenyi* v. *District Director, INS*, 385 U.S. 630, 635 (1967)). Thus, petitioner's case is at least as "factually flawed" (Pet. 19) as the other cases he discusses and is an inappropriate vehicle for deciding his second question presented.

Moreover, this Court made clear in *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 60-66 (1984), that, at all events, the government cannot be estopped on the same terms as a private litigant. This is

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FTC] but as to the fact of violation" (*id.* at 426). As discussed, pages 2-3, *supra*, the trial in this case was devoted principally to petitioner's legal challenge to the Corps' exercise of jurisdiction over his wetlands property; once petitioner lost on that issue, it could no longer be said here that "the fact of [petitioner's] violation was fairly disputed" (498 F.2d at 428, 430). Instead, all that remained to be determined was the appropriate relief to be granted by the court, including the amount of any civil penalties which might be assessed and, as the court in *J.B. Williams* said (*id.* at 438 (citation and footnote omitted)), "[T]he amount of penalties within the maximum is committed to the informed discretion of the district judge." Thus, *J.B. Williams* does not present a conflict with the court of appeals' decision here. Nor are the other court of appeals decisions cited at Pet. 12 in conflict: *FAA* v. *Landy*, 705 F.2d 624, 635 (2d Cir.) (right to jury trial not discussed), cert. denied, 464 U.S. 895 (1983); *United States* v. *New Mexico*, 642 F.2d 397, 402 (10th Cir. 1981) (court held tax recovery action to have historically given right to jury trial, and that "pivotal issue of fact" was disputed); *Quinn* v. *DiGiulian*, 739 F.2d 637, 645-647 (D.C. Cir. 1984) (compensatory and punitive damages awarded in "new cause of action sounding in tort" (see *Curtis* v. *Loether*, 415 U.S. at 196)).



so because of the interest of all citizens in enforcement of the law. A party, then, has a heavy burden in asserting that the law should not be enforced against him because of conduct by government agents; he must make "at least [a] demonstrat[ion] that the traditional elements of an estoppel are present" (*id.* at 61). These elements include a showing "that reliance [was] reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading" (*id.* at 59 (footnote and citation omitted)). Petitioner's justification for his "reliance" reduces to an assertion that, unless he was told otherwise by government officials, he was entitled to continue to fill his properties without regard to the permit requirements of the Clean Water Act. Such a self-serving argument does not meet the standards of this Court's decision in *Community Health Services*. Moreover, *Community Health Services* indicated that a sophisticated actor has "a duty to familiarize itself with the legal requirements" of its actions (*id.* at 64) and that the reasonableness of its reliance "is further undermined [if] * * * the advice it received * * * was oral" (*id.* at 65). Finally, if estoppel is ever appropriate, it would be only in an extreme case of "affirmative misconduct"—not mere nonaction—by the government. See *INS* v. *Miranda*, 459 U.S. 14, 17-19 (1982) (per curiam); *Schweiker* v. *Hansen*, 450 U.S. 785, 788 (1981) (per curiam); *INS* v. *Hibi*, 414 U.S. 5, 8 (1973) (per curiam); see also *Montana* v. *Kennedy*, 366 U.S. 308, 315 (1961). Each of these factors argues against review of the present case.[13]

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[13]In light of the fact that both courts below found that petitioner was not misled and the fact that, even if estoppel could sometimes be invoked against the government, it could not be here, there is no need to hold this petition pending decision in *Lyng* v. *Payne*, cert. granted, No. 84-1948 (Oct. 7, 1985). Compare Pet. 21 n.30.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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